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# **Breaking the Seal on White-Collar Criminal Search Warrant Materials**

David Horan\*

On an otherwise routine day, the normal operations of a small business are interrupted by the sudden appearance of twenty FBI agents. The agent-in-charge flashes his credentials and tells the receptionist that the FBI has a warrant to search the office and needs to enter the premises. The agents do not even wait for the receptionist to call her supervisor before they storm the interior of the building and herd employees into open spaces. Several agents scatter throughout offices and cubicles, rifle through desks and file drawers, and pull out and examine documents that other agents then put in boxes and load onto handcarts.

The company's manager contacts corporate counsel in a panic. Upon counsel's harried advice over the phone, the manager asks the agent-in-charge for the warrant and probable cause affidavit. The agent-in-charge tells the manager that he will receive a copy of the warrant when the agents have finished, but he must contact the prosecutor on the case about the affidavit. The agent-in-charge further informs the manager that the manager and other employees should keep their hands off everything and stay out of the agents' way. The agent-in-charge strongly implies that failure to heed this advice will be interpreted as illegal interference with the search.

Shortly thereafter, corporate counsel arrives as the raid is well underway, and the agent-in-charge denies corporate counsel's request for immediate access to the warrant. Hours later, upon completion of the raid, the agent-in-charge gives corporate counsel a copy of the search warrant and says that an inventory of seized items will be sent over soon. When pressed, the agent tells corporate counsel that the agent does not have the warrant affidavit submitted to the federal magistrate judge, but that the prosecutor should have a copy. Undaunted, corporate counsel asks why the search took place and what crime the government is investigating. The agent-in-charge again tells corporate counsel to talk to the prosecutor.

Upon reviewing the search warrant and a one-page attachment, corporate counsel learns in broad terms where the magistrate judge authorized the FBI to

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search and what the magistrate judge authorized the agents to seize. Still at a loss as to what has turned the government's intense attention onto this company, corporate counsel calls the prosecutor, who merely says that the company was searched in connection with a federal investigation of suspected fraud. The prosecutor also says that the probable cause affidavit has been placed under seal by order of the magistrate judge. Corporate counsel realizes that she needs to unseal the affidavit to discover the reason for the government's search and if the search was constitutionally valid. But upon what grounds can her client, the corporate target of this warrant, claim a right to unseal the affidavit?

This scene is not a description of a bust-up of a den of mobsters or an absurd, Kafka-esque, law school classroom counterfactual. This is a description of the execution of a federal search warrant in a white-collar criminal investigation.<sup>1</sup> This scenario is becoming increasingly routine, as federal investigators have more frequently employed search warrants in white-

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1. In this scenario, the need to unseal a search warrant affidavit by no means involves mere matters of litigation strategy. The inability to access the affidavit can impose serious economic harm on a search warrant target. An oft-cited example occurred when the Secret Service raided the offices of Steve Jackson Games, Incorporated, in Austin, Texas, using a search warrant obtained through a sealed probable cause affidavit. See *Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432, 443 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994). The company "was never charged with a crime, even though Secret Service agents who raided its offices on March 1, 1990, threw its business into disarray." Frances A. McMorris, *Companies Under Suspicion Face More Search Warrants*, WALL ST. J., July 20, 1995, at B1. "The agents, who were seeking evidence that an employee was involved in a computer hacking incident at BellSouth Corp., kept Mr. Jackson's hardware, software and files for nearly four months . . ." *Id.* Steve Jackson Games, Inc., however, was "not able to ascertain the reasons for the March 1, 1990 seizure until after the return of most of the property in June of 1990, and then only by the efforts of the offices of both United States Senators of the State of Texas." *Steve Jackson Games*, 816 F. Supp. at 443. Consequently, the company was unable to learn for several months "that the search or seizure order was made pursuant to . . . [a] statute [by which] . . . Steve Jackson Games, Incorporated could move to quash or modify the order or eliminate or reduce any undue burden on it by reason of the order." *Id.* (citing 18 U.S.C. § 2703(d)). Due to the prolonged, unexplained deprivation of the company's property, "Mr. Jackson was forced to lay off half of his small staff of 16." McMorris, *supra*, at B1.

In characterizing this criminal investigation as "white-collar," I borrow Kenneth Mann's dichotomy between street and white-collar crime. See KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 4 (1985). White-collar crimes are "crimes committed by individuals or organizations, usually in the course of business activity, and usually characterized by fraud or falsehood and by complexity." Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1895 n.2 (1992). White-collar crimes include "these major offenses: securities fraud, tax fraud, embezzlement, corruption, bribery, conspiracy to defraud, criminal regulatory violations, antitrust, and bankruptcy fraud." MANN, *supra*, at 30. Professor Abraham Goldstein notes "[s]uch crimes occur in the fields of finance and industry where the context is typically one of a group or an organization, the dangers addressed are less tangible, the culpability of defendants is less plain, and the conduct is less obviously immoral." *Id.* at 1895 n.2.

Contrary to white-collar criminal activity, street crime involves "'ordinary' crime, i.e., crimes such as homicide, assault, rape, robbery, and burglary." Geoffrey C. Hazard, Jr., *Quis Custodiet Ipsos Custodes?*, 95 YALE L.J. 1523, 1526 (1986) (reviewing KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985)). Typically, street crime "involv[es] threat and use of physical violence against persons, drug violations, theft involving use of physical force, and other related crimes." MANN, *supra*, at 4.

collar investigations in the last decade.<sup>2</sup> As demonstrated in the above example, federal prosecutors have also increasingly sought orders to seal the probable cause affidavits upon which magistrate judges grant search warrants in white-collar investigations.<sup>3</sup> Academic commentators, however, have paid little attention to this increasingly prominent phenomenon in the affairs of businesses throughout the country.<sup>4</sup>

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2. See McMorris, *supra* note 1, at B1; see also *infra* Part I.A. and text accompanying note 7.

3. Telephone Interview with Nelida Finch, Director of Docketing for the Clerk's Office of the Northern District of Illinois, Eastern Division (Chicago) (Apr. 9, 1999) (describing sealing orders as "common," particularly "for short periods of time" from "30 days to a year and a half"). For a full discussion of this trend, see *infra* Part IB and text accompanying notes 36-39.

The scope of this article is limited to federal search warrants and the caselaw and rules governing them. State constitutional or procedural code provisions are not discussed because these provisions are too diverse for consideration within this article. States may grant targets of state warrants greater access rights to warrant applications and materials than the access that targets have in federal courts.

4. Several law review notes and comments from the early 1990s cover the few federal appellate decisions addressing First Amendment and common law access rights to sealed search warrant affidavits. E.g., Peter G. Blumberg, Comment, *Sunshine and Ill Wind: The Forecast for Public Access to Sealed Search Warrants*, 41 DEPAUL L. REV. 431 (1992); Robert J. Brantman & Scott K. Martinsen, Case Comment, *Constitutional Law—Times Mirror Co. v. United States and a Qualified First Amendment Right of Public Access to Search Warrant Proceedings and Supporting Affidavits*, 65 NOTRE DAME L. REV. 781 (1990) (discussing *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989)); Erica A. Kaston, Note, *The Expanding Right of Access: Does It Extend to Search Warrant Affidavits?*, 58 FORDHAM L. REV. 655 (1990); Julie Esther Keller, Comment, *Access Deferred Is Access Denied*, 15 WM. MITCHELL L. REV. 739 (1989) (discussing *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988)); Jeffrey L. Levy, Note, *An Ill Wind Blows: Restricting the Public's Right of Access to Search Warrant Affidavits*, 74 MINN. L. REV. 661 (1990); Lynn B. Oberlander, Note, *A First Amendment Right of Access to Affidavits in Support of Search Warrants*, 90 COLUM. L. REV. 2216 (1990); Kathryn Tabner, Comment, *Does a Denial of Access to Search Warrant Affidavits Abridge the First Amendment Rights of the Press?*, 55 ALB. L. REV. 495 (1991); Sallie Thieme, Comment, *Pretrial Access Rights: The Operation Ill-Wind Cases*, 43 FED. COMM. L.J. 79 (1990).

A few law review articles devote some attention to the rising tide of white-collar searches and seizures and the use of sealed affidavits. E.g., Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383, 449-65 (1994) (analyzing "the hybrid criminal/civil nature of white collar crime" in the context of searches); Charles Pereyra-Suarez & Carole A. Klove, *Ring Around the White Collar: Defending Fraud and Abuse*, 18 WHITTIER L. REV. 31, 39-40 (1996) (suggesting preventive measures for practitioners to handle white-collar government searches and seizures). Yet, at least one commentator has concluded that, in the white-collar criminal context, "[s]earch warrants are generally a less appealing means to obtain documents because of the greater burden placed on the prosecution . . ." Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 414 (1993).

A few other law review articles suggest reforms for sealing orders on affidavits in the context of specific cases. E.g., Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53, 79 (1998) (discussing sealed affidavit issues in the Timothy McVeigh trial); David B. Kopel & Paul H. Blackman, *The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment*, 18 HAMLINE J. PUB. L. & POL'Y 1, 38, 49-51 (1996); cf. David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 339 (1996) (suggesting statutory time limits on sealing orders).

This Article argues for stricter standards of judicial review and codified procedures to regulate the government's practice of sealing warrant materials in white-collar investigations. The Article proposes a statutory, presumptive *ex post* right of access by the target to a search warrant's underlying materials. These statutory procedures would require that prosecutors demonstrate a compelling interest in continued nondisclosure to maintain a sealing order on affidavits and other warrant materials.

Part I describes the rising use of search warrants and sealing orders in white-collar investigations. Part II examines the procedure by which the government seals search warrant materials in certain federal jurisdictions, and Part III explains the changes this induces from the normal procedures governing the execution of federal search warrants. Part IV argues for statutory reform of the Federal Rules of Criminal Procedure to regulate and standardize the use of sealing orders and access to warrant materials. Part V analyzes the limited judicial treatment of targets' challenges to sealing orders on search warrant affidavits. The Article concludes in Part VI with the proposal of a new subsection of Federal Rule of Criminal Procedure 41 (hereinafter "Rule 41") that would institute a significantly different approach from the current regime, a regime in which targets must seek access to sealed materials after the fact by resting their claims upon limited rights of access shared by the media and general public.

## I. THE RISING USE OF SEARCH WARRANTS AND SEALED AFFIDAVITS IN THE WHITE-COLLAR CONTEXT

### A. *The Increased Use of White-Collar Search and Seizure Tactics*

Until the late 1980s, federal agencies and prosecutors typically employed less intrusive investigative methods to gather evidence of white-collar crime than the tactics used to investigate street crime.<sup>5</sup> "Federal investigators usually relied upon grand jury subpoenas in 'white collar' cases and reserved search warrants for Elliott Ness-style attacks on narcotics, organized crime, terrorism, or other dangerous activity where sudden and immediate intervention was critical."<sup>6</sup> Now, practitioners and commentators have observed that federal agents and prosecutors have sharply increased the use of search warrants in white-collar investigations over the course of the last fifteen years.<sup>7</sup>

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5. See McMorris, *supra* note 1, at B1; see also MANN, *supra* note 1, at 249 (describing methods of investigation for white-collar crime and street crime at the time of the book's publication in 1985).

6. W. Thomas McGough, Jr., *Search and Seizure in the United States: Surviving a Search Warrant*, ANTITRUST, Spring 1996, at 6.

7. E.g., Steven G. Johnson, *What to Do if a Federal Search Warrant Is Served on your Corporate Client*, UTAH B.J., Apr. 1997, at 11 (noting that in white-collar criminal investigations "[t]he number of search warrants obtained by federal prosecutors has increased dramatically in recent years, jumping 84% from 1988 to 1994"); Thomas M. Bradshaw & Dianne M. Hansen, *Search Warrants for Business*

This trend developed because of the investigatory needs in white-collar cases and the training and background of federal investigators and prosecutors. In white-collar cases, investigators may employ search warrants, in lieu of subpoenas or summonses for documents, because "they are concerned about the destruction of documents or the absence of a good faith and honest response by the subpoenaed party."<sup>8</sup> Additionally, many federal agents and prosecutors now working on white-collar cases began their careers working federal drug and organized crime cases, which require the routine use of intrusive search procedures.<sup>9</sup> The agents and prosecutors have carried these methods over to their efforts to combat white-collar crime. For example, agents and prosecutors who first learned to investigate through the defense procurement fraud investigations during the later 1980s have now imported the methods used in those cases into the investigations of health care fraud.<sup>10</sup>

The government faces very few disadvantages by such use of search warrants. One disadvantage is that prosecutors must show probable cause to a magistrate judge to obtain a search warrant,<sup>11</sup> whereas prosecutors can issue

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*Records: Challenges and Defenses*, 49 J. MO. B. 23 (1993) (white-collar criminal investigations); Charles M. Carberry, *Investigative Methods Available to the Prosecution in Criminal Securities Cases*, in *Securities Enforcement Institute* 1988, at 7, 9-10 (P.L.I. Corp. Law & Practice Course Handbook Series No. B4-6837, 1988) (criminal securities investigations); Jonny J. Frank & Ronald G. Blum, *Handling U.S. Agents Bearing a Search Warrant*, NAT'L L.J., Apr. 17, 1995, at C23 (white-collar criminal investigations); Kenneth A. Grady & Craig H. Zimmerman, *Preparing for the Onslaught: Search Warrants and Inspections in Environmental Criminal Cases*, NAT. RESOURCES & ENV'T, Spring 1994, at 7 (criminal enforcement of environmental laws); Steven M. Kowal, *Execution of a Criminal Search Warrant by FDA—Effective Preparation and Response*, 52 FOOD & DRUG L.J. 117 (1997) (FDA investigations); McGough, *supra* note 6, at 6 (antitrust investigations); McMorris, *supra* note 2, at B1 (white-collar criminal investigations); Cathy L. Naugle, *How to Recognize a Health Care Fraud Case Before They Serve the Search Warrant!*, ADVOC., Feb. 1997, at 15, 18 (health care fraud investigations); Frederick Robinson & J.A. Patterson, Jr., *A Health Lawyer's Guide to Search Warrants*, HEALTH LAW, Oct. 1997, at 12 (health care fraud investigations); Michael A. Vacchio, *Invasion of the Computer Snatchers*, FED. LAW., June 1997, at 26, 29 (investigations of computer-related crimes and searches of law offices); Gregory J. Wallance, *Searches and Seizures of Businesses: How Corporate Counsel Can Protect Firm Interests and Rights*, in *Corporate Compliance*, at 609, 611 (P.L.I. Corp. Law & Practice Course Handbook Series No. B4-7145, 1996) (white-collar criminal investigations of corporations); Roger E. Zuckerman et al., *The Gloves Are Off: The New Rough and Tumble in Prosecuting White Collar Crime*, CRIM. JUST., Winter 1988, at 8, 10-11 (white-collar criminal investigations).

8. Zuckerman et al., *supra* note 7, at 10-11.

9. McMorris, *supra* note 1, at B1 (citing statements from former National Association of Criminal Defense Lawyers President Gerald H. Goldstein); *see also* Frank & Blum, *supra* note 7, at C23; Kowal, *supra* note 7, at 120.

10. Pereyra-Suarez & Klove, *supra* note 4, at 37. This trend will likely continue: "Currently an estimated 10% of all private and public health care expenditures in the United States are the result of fraudulent and/or abusive conduct by those who provide medical goods and services . . ." Naugle, *supra* note 7, at 15. "[F]ederal and state authorities have made the investigation, detection and vigorous prosecution of health care fraud and abuse a national priority since the early 1990's." *Id.*

11. FED. R. CRIM. P. 41(c)(1).

subpoenas simply by presenting evidence to a grand jury.<sup>12</sup> If the government has reason to believe that a crime has been or is being committed and that a search of a place will produce evidence of that crime, a prosecutor with information from a federal agent must generally seek a search warrant from a magistrate judge under Rule 41.<sup>13</sup> To obtain a warrant, the prosecutor must prepare an affidavit from the agent in accordance with the requirement under Rule 41(c)(1) that a search warrant “issue only on an affidavit or affidavits sworn to before the federal magistrate judge . . . and establishing the grounds for issuing the warrant.”<sup>14</sup>

Nevertheless, prosecutors may still seek search warrants rather than pursue less intrusive investigatory methods entirely at their discretion.<sup>15</sup> “There is no requirement that, absent the warrant, evidence might be concealed or destroyed, or that the documents cannot otherwise be obtained by subpoena or some other less intrusive method.”<sup>16</sup> In fact, neither the Department of Justice nor the United States Attorney’s Manual provides guidelines for federal prosecutors when deciding to seek a search warrant.<sup>17</sup> One commentator noted: “Especially in light of the ‘good faith’ exception to the exclusionary rule, the time and effort necessary to obtain a warrant may be worthwhile even in complex economic crime cases.”<sup>18</sup> Search warrants, however, pose many disadvantages to white-collar targets. Practitioners have enumerated three unique problems search warrants present for defense counsel.<sup>19</sup> First, a federal search often turns a business upside down, particularly because large-scale searches often draw media attention and shut down the operations of a company for at least the duration of the search.<sup>20</sup> Second, “although a warrant must state with particularity the things to be seized, the evidence gathered in a search may be greater than that gathered by subpoena.”<sup>21</sup> Third, a search target can only challenge a search after the government executes the warrant and seizes its evidence.<sup>22</sup> In contrast, defense counsel can regulate and monitor the production of evidence under a subpoena.<sup>23</sup> The government’s desire to avoid

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12. FED. R. CRIM. P. 17.

13. FED. R. CRIM. P. 41.

14. FED. R. CRIM. P. 41(c)(1).

15. See Zuckerman et al., *supra* note 7, at 10.

16. Frank & Blum, *supra* note 7, at C23.

17. See Zuckerman et al., *supra* note 7, at 10.

18. *Id.* (citing *United States v. Leon*, 468 U.S. 897 (1984)).

19. *Id.*; see also Robinson & Patterson, *supra* note 7, at 12 (stating that “it is extremely easy for the government to get a search warrant any time it wants to”).

20. Zuckerman et al., *supra* note 7, at 10; Wallance, *supra* note 7, at 611 (“[S]ince there is no inherent secrecy about such a raid, unlike a grand jury subpoena, there is a possibility of adverse publicity portraying the company as the target of a criminal investigation.”).

21. Zuckerman et al., *supra* note 7, at 10.

22. *Id.*

23. *Id.* (noting that counsel can “retain copies of those documents the grand jury receives, withhold privileged documents, and contest disputed discovery issues before potentially incriminating evidence has been produced”).

reliance on voluntary compliance with a subpoena runs counter to the target's interests.

White-collar defense attorneys have noted, however, that search warrants do provide targets "with certain unique opportunities for pre-indictment discovery."<sup>24</sup> After the execution of a search warrant, the target gains insight into governmental suspicions and an opportunity to gather evidence in its own defense.<sup>25</sup> This allows the target to begin the process of resolving the matter for itself and for its employees.<sup>26</sup> Defense counsel obtains this information primarily through the probable cause affidavit, which "provides a blueprint of the government investigation and may well affect the company's legal posture."<sup>27</sup>

### *B. The Increased Use of Sealing Orders for White-Collar Search Warrant Affidavits*

Motions made by the government to seal the probable cause affidavit frustrate targets' access to information about the reasons for the search. At the time of obtaining a warrant, federal prosecutors can request that an affidavit be sealed to prohibit disclosure to the public, the press, or the target of the search.<sup>28</sup> The prosecutor may also move to seal the entire search warrant application, the motion to seal itself,<sup>29</sup> and even the court's order to seal.<sup>30</sup>

Even without a sealing order, targets generally have no advance notice of an impending search,<sup>31</sup> and agents executing warrants usually do not deliver affidavits to targets or even carry affidavits to search locations.<sup>32</sup> Moreover, the federal magistrate judge will not file the warrant and its application materials with the district court clerk—thereby exposing these materials to public access—until agents have executed and returned the warrant and an inventory of

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24. *Id.* at 11.

25. Grady & Zimmerman, *supra* note 7, at 7.

26. *Id.*

27. Frank & Blum, *supra* note 7, at C25 (noting that "[t]he warrant affidavit also may [sic] help public relations personnel anticipate and frame a response to media inquiries concerning the search").

28. *In re Sealed Affidavit(s) to Search Warrants Executed on Feb. 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979).

29. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989).

30. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988).

31. Indeed, federal law makes it a crime for a person to give notice of an impending search. 18 U.S.C. § 2232(b) (1994).

32. McGough, *supra* note 6, at 7-8.



items seized to the issuing magistrate judge.<sup>33</sup> With a sealing order, however, the government denies the target access to these materials even after the agents complete the search.

Sealing a search warrant affidavit was originally understood to be “an extraordinary action.”<sup>34</sup> Only twelve years ago, a defense practitioners’ article could claim that “[m]otions to seal affidavits are not commonly granted.”<sup>35</sup> A review of more contemporary practitioners’ commentary no longer supports this claim.<sup>36</sup> Indeed, in many cases, courts have sealed search warrant

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33. See FED. R. CRIM. P. 41(d) (“The return shall be made promptly and shall be accompanied by a written inventory of any property taken.”); FED. R. CRIM. P. 41(g) (“The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.”).

34. 3 CHARLES ALAN WRIGHT, *FEDERAL PRACTICE AND PROCEDURE CRIM.* § 672 at 752 (2d ed. 1982 & Supp. 2000); see also *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 212 (D.R.I. 1980) (describing sealing as an “unusual step”).

35. Zuckerman et al., *supra* note 7, at 11.

36. See Frank & Blum, *supra* note 7, at C25 (noting that requests to seal “in economic crime cases” are “becoming more frequent”); see also Carberry, *supra* note 7, at 11; John F. Cooney et al., *Criminal Enforcement of Environmental Laws: Part III—From Investigation to Sentencing and Beyond*, ENVTL. L. REP., Nov. 1995, at 10,600; *Dangerous Environment*, FED. LAW., June 1997, at 28; Lawrence D. Finder, *Searched, Seized, Aggrieved*, Hous. LAW., Mar.-Apr. 1997, at 24, 27; Kowal, *supra* note 7, at 123; McGough, *supra* note 6, at 8; Scott D. Michel et al., *Representing the Client During a Criminal Investigation: Defense Tactics During IRS Administrative and Grand Jury Investigations*, 1997 A.B.A. Sec. Tax’n C1, C41; Robert G. Morvillo, *Secrecy in Criminal Cases*, N.Y. L.J., Apr. 4, 1995, at 3; Pereyra-Suarez & Klove, *supra* note 4, at 37-38; James E. Phillips et al., *Litigating Sealed Search Warrants*, THE CHAMPION, Mar. 1996, at 7; Vacchio, *supra* note 7, at 31; Wallance, *supra* note 7, at 613.

Unfortunately, empirical data on the frequency of sealing orders or the proportion of warrants issued with sealed affidavits to those issued without sealing orders is unavailable. The Administrative Office of the Courts reports that magistrate judges nationwide issued 29,563 federal search warrants between October 1, 1996, and September 30, 1997, Administrative Office of the Courts, *Judicial Business of the United States Courts 1997*, tbl. M-3 (visited Mar. 30, 1999), available at [http://www.uscourts.gov/judicial\\_business/contents.html](http://www.uscourts.gov/judicial_business/contents.html), and 30,371 federal search warrants between October 1, 1997, and September 30, 1998, Administrative Office of the Courts, *Judicial Business of the United States Courts 1998*, tbl. M-3 (visited Mar. 30, 1999), available at <http://www.uscourts.gov/dir98/index.html>.

For several reasons, however, it is impossible to discern how many of those warrants were issued with sealing orders. First, search warrant practice in each federal district currently operates under its own standards and procedures. See, e.g., U.S. Dist. Ct. R. D. Utah, Cr. R. 16-2. Discovery—Search Warrants. Second, by the nature of a sealing order, even a time- and labor-intensive search of selected federal districts’ dockets, using the electronic PACER systems, would not disclose the presence of sealed materials. Telephone Interview with Linda Gonzales, Magistrate Clerk, Southern District of Texas (Houston District Court) (April 8, 1999) (“Usually [search warrant materials are] sealed until they are returned, and once they are unsealed [they are] made available to the public unless there’s an order to seal in the file also. And then it will not be unsealed or available until [the] judge unseals it.”). Many district clerks’ offices file search warrant materials under separate magistrate or miscellaneous case numbers, but a warrant return accompanied by a sealing order will not be indexed at all. Telephone Interview with Cynthia Davis, District Court Clerk’s Office, Eastern District of Missouri, St. Louis Division (Apr. 8, 1999) (describing the practice of giving search warrant materials a magistrate case number and filing separately); Telephone Interview with Felicia Cannon, Chief Deputy Clerk, District of Maryland, Northern (Baltimore) Division (Apr. 9, 1999) (“If not sealed, [search warrant materials] generally would be filed under an assigned magistrate’s case number and publicly available.”); Telephone Interview with Nelida Finch, *supra* note 3 (noting that “when sealed, the search warrant materials are not even indexed or shown to exist on the Clerk’s Office’s

affidavits based on "nothing more than the prosecutor's conclusory assertion" that disclosure would jeopardize the investigation.<sup>37</sup> Some prosecutors have been able to maintain sealing orders on the government's motions to seal and even on the sealing orders themselves,<sup>38</sup> although such extensive orders deny targets any access to "knowledge of the basis for secrecy, as well as the basis for the search."<sup>39</sup>

Still, prosecutors by no means invariably seek sealing orders for search warrant affidavits in bad faith. Frequently, the actual advantages to the government of sealing match the justifications given by prosecutors when requesting these sealing orders. Prosecutors understandably seek to prevent disclosure of the identities of informants or government witnesses who are at great risk from search warrant targets. Prosecutors may also justifiably believe that certain targets will destroy evidence of their crimes if given notice and opportunity. Even where courts should require a more extensive showing of cause to seal warrant materials but do not, these justifications may constitute compelling interests.

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filing system"). Third, because of the concerns motivating sealing orders, a survey of sealing practices would require researchers to have full access to the courts' files. As a result, only a study commissioned by the Administrative Office of the Courts or the Federal Judicial Center could obtain such information, but no centralized study or even collection of the number of sealing orders exists, according to the Federal Judicial Center. Telephone Interview with Matt Sarago, Federal Judicial Center (Apr. 2, 1999).

Alternatively, the documentation of the rate of sealing orders on search warrant materials could be commissioned by the Rules Committee for the Federal Rules of Criminal Procedure. This study would be important if the Rules Committee were to suggest a proposed rule governing sealing practices, such as my proposed Rule 41(i). See *infra* Part VI and text accompanying notes 179-81.

37. Phillips et al., *supra* note 36, at 7; see also McGough, *supra* note 6, at 8 (characterizing sealed affidavit as "ostensible protection" for the investigation); Morvillo, *supra* note 36, at 3 (noting the "ease with which prosecutors obtain sealing orders"); Vacchio, *supra* note 7, at 31 (recognizing that "courts have repeatedly accepted the prosecutors' contentions that disclosure of the affidavit will interfere with or jeopardize the investigation"). The Ninth Circuit has noted:

[The government] has always been able to restrict access to warrant materials by requesting a sealing order, which courts have granted freely upon a showing that a given criminal investigation requires secrecy . . . . Both the magistrate in granting the original sealing order and the district court in reviewing such orders have necessarily been highly deferential to the government's determination that a given investigation requires secrecy and that warrant materials be kept under seal.

*Times Mirror Co. v. United States*, 873 F.2d 1210, 1214 (9th Cir. 1989).

38. See Phillips et al., *supra* note 36, at 7 n.4.

39. *Id.*

## II. CURRENT PROCEDURES FOR SEALING SEARCH WARRANT AFFIDAVITS

The Supreme Court has not addressed the courts' power to seal search warrant materials, but commentators and federal courts have uniformly relied on the Ninth Circuit's holding in *In re Sealed Affidavit(s) to Search Warrants Executed on February 14, 1979*, the first federal appellate decision to approve the practice.<sup>40</sup> The Ninth Circuit held that federal courts can seal probable cause affidavits through their "inherent power, as an incident of their constitutional function, to control papers filed with the courts within certain constitutional and other limitations."<sup>41</sup>

The Fourth Circuit has provided the most detailed procedural prescription for sealing search warrant affidavits in *Baltimore Sun Co. v. Goetz*.<sup>42</sup> Although courts outside of that jurisdiction are not bound by this decision, several federal courts have expressed approval of the Fourth Circuit's procedure.<sup>43</sup> The *Baltimore Sun* court first noted that "[t]he motion to seal all or part of the papers is usually made when the government applies for the warrant" and that "[f]requently the proceedings must be conducted with dispatch to prevent destruction or removal of the evidence."<sup>44</sup> Therefore, if a magistrate judge believes the government's showing of cause, the magistrate judge can adopt the prosecutor's factual claims but cannot cede the decision to seal to the government.<sup>45</sup>

Although the *Baltimore Sun* court did not explicitly dictate the form the government's submission in support of a motion to seal must take, some courts accept additional affidavits explaining the need for nondisclosure of the probable cause affidavit.<sup>46</sup> The Fourth Circuit, in fact, anticipated that prosecutors may file supporting materials with motions to seal and indicated

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40. 600 F.2d 1256 (9th Cir. 1979). *E.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989); *see also* WRIGHT, *supra* note 34, § 672 at 752 (recognizing explicitly that "[t]he court has the power to order the affidavits sealed").

Several federal districts have established local rules governing sealing orders. *E.g.*, U.S. Dist. Ct. R. C.D. Cal., Magis. R. 2.14; U.S. Dist. Ct. R. E.D. Okla., Local Cr. R. 4.1.A—Warrants and Complaints; U.S. Dist. Ct. R. W.D. Okla., Local Cr. R. 4.1—Sealing of Warrants and Complaints; U.S. Dist. Ct. R. N.D. Okla., Local Cr. R. 4.1.A—Warrants and Complaints; U.S. Dist. Ct. R. D. Utah, Cr. R. 16-2. Discovery—Search Warrants.

41. 600 F.2d at 1257 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.")).

42. 886 F.2d 60, 65-66 (4th Cir. 1989).

43. *See, e.g.*, *In re Search of EyeCare Physicians of America*, 910 F. Supp. 414, 415 (N.D. Ill. 1996), *aff'd*, 100 F.3d 514 (7th Cir. 1996); *In re Search of Flower Aviation of Kansas, Inc.*, 789 F. Supp. 366, 368 (D. Kan. 1992).

44. *Baltimore Sun*, 886 F.2d at 65 (citing *Franks v. Delaware*, 438 U.S. 154, 169 (1978)).

45. *See id.*

46. *See, e.g.*, *In re Search of Wag-Aero, Inc.*, 796 F. Supp. 394, 395 (E.D. Wis. 1992) (describing an affidavit from "a special agent of the customs service" used by the magistrate judge in deciding a motion to seal), *aff'd*, 35 F.3d 569 (7th Cir. 1994).

that these materials can also be sealed.<sup>47</sup> Presumably, a magistrate judge could also "require the affiant to appear personally and . . . examine under oath the affiant and any witnesses the affiant may produce" in deciding a motion to seal.<sup>48</sup>

The *Baltimore Sun* court then explained that the magistrate judge can grant a sealing order if it "is 'essential to preserve higher values and is narrowly tailored to serve that interest.'"<sup>49</sup> Before granting a sealing order, however, the magistrate judge should evaluate other options, such as disclosing some selected documents or providing access to a redacted version.<sup>50</sup> The magistrate judge must also provide specific reasons for a sealing order and factual findings to allow appellate review of the decision.<sup>51</sup>

According to the late Professor Charles Alan Wright, sealing a warrant affidavit "is an extraordinary action, and should be done only if the government shows a real possibility of harm."<sup>52</sup> Although some courts have adopted this standard, court decisions offer several standards for the showing required to obtain a sealing order. Four standards recur throughout the reported decisions: (1) the government must "establish good cause for" sealing the affidavit;<sup>53</sup> (2) the government must "demonstrate a real possibility of harm";<sup>54</sup> (3) the government must "show . . . (1) that a compelling governmental interest requires the materials be kept under seal and (2) there is no less restrictive means, such as redaction, available";<sup>55</sup> and (4) the government must show that "sealing is 'essential to preserve higher values and is narrowly tailored to serve that interest.'"<sup>56</sup>

Whatever standard a court employs, "[t]he federal agent who signs the affidavit will take great pains to emphasize the sensitivity of the information becoming public, and to underscore the importance of keeping the information

47. *Baltimore Sun*, 886 F.2d at 65.

48. FED. R. CRIM P. 41(c)(1). There is no reason to believe, however, that courts usually do so.

49. *Baltimore Sun*, 886 F.2d at 65-66 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (hereinafter *Press-Enterprise I*)).

50. *Id.* at 66 (citing *Press-Enterprise I*, 464 U.S. at 501).

51. *Id.* at 65 (citing *Press-Enterprise I*, 464 U.S. at 510).

52. WRIGHT, *supra* note 34, at § 672.

53. *In re Search of a Residence which is Situated on a Cul-de-sac*, 121 F.R.D. 78, 80 (E.D. Wis. 1988); see also *supra* note 40 (listing local federal court rules codifying this standard).

54. *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 212 (D.R.I. 1980).

55. *In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 299 (S.D. Ohio 1995); see also *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 575 (8th Cir. 1988); *In re Up North Plastics, Inc.*, 940 F. Supp. 229, 233 (D. Minn. 1996).

56. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65-66 (4th Cir. 1989) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)); see also *In re Search of EyeCare Physicians of America*, 910 F. Supp. 414, 415 (N.D. Ill. 1996) (adopting *Baltimore Sun* court's standard), *aff'd*, 100 F.3d 514 (7th Cir. 1996).

from the general public” or target.<sup>57</sup> Federal courts have accepted numerous reasons offered by federal prosecutors for sealing warrant affidavits:

- (1) “[T]he affidavit may . . . disclose information gleaned from wiretaps that have not yet been terminated, or reveal the identity of informers whose lives would be endangered”;<sup>58</sup>
- (2) “The government has demonstrated that restricting public access to these documents is necessitated by a compelling government interest—the on-going investigation,” where “[t]hese [affidavits] describe in considerable detail the nature, scope and direction of the government’s investigation and the individuals and specific projects involved”;<sup>59</sup>
- (3) “These search warrant affidavits implicate some individuals directly in criminal misconduct, others only indirectly,” and “[d]isclosure could seriously damage their reputations and careers” and “place those individuals in essentially the same precarious position as unindicted co-conspirators”;<sup>60</sup>
- (4) “Release of the names of witnesses in the affidavits will lead to intense media scrutiny that will harass present witnesses and deter future witnesses from coming forward”;<sup>61</sup>
- (5) “[D]isclosure of the sealed affidavits would breach the secrecy of the grand jury”;<sup>62</sup>
- (6) “[T]he identity of unnamed subjects not yet charged would be revealed”;<sup>63</sup>
- (7) “[T]here may be mistaken notions concerning who might and might not be cooperating with the government or who may be subjects . . . [or] misunderstandings about the parameters of the government’s investigation”;<sup>64</sup> and
- (8) “[T]he scope of the investigation would be revealed so as to give petitioners premature guidance concerning potential charges.”<sup>65</sup>

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57. *Pereyra-Suarez & Klove*, *supra* note 4, at 38.

58. *Baltimore Sun*, 886 F.2d at 64. The court in *Times Mirror Co. v. United States* went further, holding there is no access right to sealed warrant materials “when the investigation was still ongoing, [in part because] persons identified as being under suspicion of criminal activity might destroy evidence, coordinate their stories before testifying, or even flee the jurisdiction.” *Times Mirror Co. v. United States*, 873 F.2d 1210, 1215 (9th Cir. 1989).

59. *Search Warrant for Secretarial Area*, 855 F.2d at 574.

60. *Certain Interested Individuals, John Does I-V, who are Employees of McDonnell Douglas Corp. v. Pulitzer Publ’g Co.*, 895 F.2d 460, 467 (8th Cir. 1990).

61. *In re Four Search Warrants*, 945 F. Supp. 1563, 1568 (N.D. Ga. 1996).

62. *In re EyeCare Physicians of America*, 100 F.3d 514, 519 (7th Cir. 1996).

63. *Id.*

64. *Id.*

65. *Id.* at 516 (quoting the decision of the magistrate judge); *see also In re Macon Tel. Publ’g Co.*, 900 F. Supp. 489, 492 (M.D. Ga. 1995) (“Targets will be able to tailor their defenses based upon information in the affidavits.”).

In fact, the only justification rejected by some courts has been "a *conclusory* allegation of an ongoing investigation" that *could* be compromised by disclosure of the affidavit.<sup>66</sup> Far more often, federal courts have fallen in line with one federal district court's observation that "the fact that there is an on-going criminal investigation could" justify a sealing order.<sup>67</sup>

### III. THE EFFECTS OF SEALING ORDERS ON THE EXECUTION OF FEDERAL SEARCH WARRANTS

#### A. *Purposes of the Warrant Requirement*

To understand the normal context for search warrant procedures, it is important to first survey the reasons for the warrant requirement and the functions search warrants serve. The Supreme Court has long professed a preference for searches made pursuant to warrants.<sup>68</sup> The Court's decisions state that "the [government] must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," such that, "in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances."<sup>69</sup> Indeed, the Court has consistently held that warrants are required for all searches "subject only to a few specifically established and well-delineated exceptions."<sup>70</sup>

The Supreme Court has identified several purposes that search warrants serve: "to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure,"<sup>71</sup> "to substitute the judgment of the magistrate for that

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66. *In re Up North Plastics, Inc.*, 940 F. Supp. 229, 233 (D. Minn. 1996) (emphasis added); see also *In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 299-300 (S.D. Ohio 1995); cf. *In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 212 (D.R.I. 1980) (holding the mere possibility of harm is insufficient).

67. *Aug. 29, 1994*, 889 F. Supp. at 299. For examples of courts accepting this claim as grounds for sealing, see *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) and *In re Search of Flower Aviation of Kansas, Inc.*, 789 F. Supp. 366, 368 (D. Kan. 1992).

68. See, e.g., *United States v. Ventresca*, 380 U.S. 102, 106 (1965) (noting that the "Court, strongly supporting the preference to be accorded searches under a warrant, [has] indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall").

69. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

70. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); see also *Horton v. California*, 496 U.S. 128, 133 n.4 (1990) (same). The "exceptions are neither few nor well-delineated" any longer, if they ever were. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 (1985).

71. *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976); see also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 911-13 (1991) (noting the protection that warrants offer targets from judicial bias in *ex post* determinations of reasonableness).

of the searching or seizing officer,”<sup>72</sup> and to provide the target with “an independent assurance that a search . . . will not proceed without probable cause to believe that a crime has been committed.”<sup>73</sup> In short, the “warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.”<sup>74</sup> According to the Supreme Court, warrants, by design, protect government search targets from investigatory overreaching and reassure targets that the government is acting under lawful authority and performing necessary criminal investigations that require invasions of privacy and the seizure of property.<sup>75</sup>

### *B. Targets’ Access to a Copy of a Search Warrant’s Probable Cause Affidavit*

Current federal law does not require that agents executing federal search warrants present or even possess probable cause affidavits at search locations.<sup>76</sup> Because Rule 41(d) requires only that agents executing a warrant give the target “a copy of the warrant and a receipt for the property taken,” a white-collar search target generally will only receive warrant materials at the end of a search.<sup>77</sup>

The warrant itself will not inform the target of the reason or justification for the search, but will indicate merely who issued the warrant, where the agents may search, and what they may seize.<sup>78</sup> Instead, the target must review the government’s affidavit providing the basis for the magistrate judge’s finding of probable cause.<sup>79</sup> The affidavit will typically be available from the

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72. *Martinez-Fuerte*, 428 U.S. at 566.

73. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

74. *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *rev’d on other grounds by California v. Acevedo*, 500 U.S. 565 (1991); *see also Michigan v. Tyler*, 436 U.S. 499, 508 (1978) (“[A] major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry’s legality.”).

75. *See Oberlander, supra* note 4, at 2228–42, for a good overview of the historical access to warrant affidavits provided under common law and federal statute and the relation of this access to the Fourth Amendment’s purpose: “to protect the citizen from excesses of the executive.”

76. *See Naegele Outdoor Adver. Co. v. Moulton*, 773 F.2d 692, 694 n.2 (6th Cir. 1985) (noting that the “actual service of the affidavit has never been required as a condition to the valid execution of a warrant”); *see also United States v. Hubbard*, 493 F. Supp. 209, 219 (D.D.C. 1979) (same); Frank & Blum, *supra* note 7, at C25 (“The search team is not required to produce the warrant affidavit, and oftentimes it is not in their possession.”).

77. FED. R. CRIM. P. 41(d); *Katz v. United States*, 389 U.S. 347, 356 n.16 (1967) (citing *Nordelli v. United States*, 24 F.2d 665, 666–67 (9th Cir. 1928)); *see also Wright, supra* note 34, § 671 at 744–45 (noting that Rule 41(d)’s requirement “does not invariably require that the copy . . . be given before the search takes place”).

78. *Johnson, supra* note 7, at 13; *see also* FED. R. CRIM. P. 41(c) advisory committee’s note to 1972 enactment (eliminating the requirement that the warrant state the grounds for its issuance).

79. FED. R. CRIM. P. 41(c) advisory committee’s note.

district clerk of the issuing court shortly after the execution of the warrant,<sup>80</sup> when the magistrate judge files the search warrant materials as required by Rule 41(g).<sup>81</sup> When a court places an affidavit under seal, however, the sealing order prevents a target from obtaining a copy of the affidavit or even reviewing the affidavit immediately following the search.<sup>82</sup>

### C. Harms to Targets of Search Warrants Obtained and Executed with Sealed Affidavits

The magistrate judge will often set a time limit on the sealing order, although the court need not set a definite time for unsealing.<sup>83</sup> Accordingly, the target may not even know *when* he can learn the reason for the government's search.<sup>84</sup> Some prosecutors successfully request that magistrate judges "routinely seal[] search warrant affidavits until after an indictment is returned" out of "a desire . . . to gain a tactical advantage."<sup>85</sup>

Because several months, or even years, often separate a white-collar search and the government's decision about whether or not to press any formal charges,<sup>86</sup> a sealing order denies a white-collar target access to the affidavit for a substantial period of time.<sup>87</sup> The government may even wait until just before the statute of limitations runs—most often five years in non-capital cases—to bring an indictment.<sup>88</sup> Yet, without the information contained in the affidavit, the target and its counsel cannot properly determine whether the affidavit is

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80. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) ("[A]lthough the process of issuing search warrants has traditionally not been conducted in an open fashion, search warrant applications and receipts are routinely filed with the clerk of court without seal."); *see also infra* text accompanying notes 171-73.

81. *In re Application of Newsday, Inc.*, 895 F.2d 74, 77 (2d Cir. 1990); *see also In re Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 209 (D.R.I. 1980) (noting "the general principle that all papers filed with the clerk become public record available for inspection").

82. *Newsday*, 895 F.2d at 75.

83. *See Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989).

84. *See id.*

85. Vincent J. Marella, *End the War Between Prosecution and Defense*, 10 A.B.A. Sec. CRIM. JUST. 34, 35 (Summer 1995); *see also Carberry, supra* note 7, at 11; Kowal, *supra* note 87, at 123.

86. *E.g.*, Finder, *supra* note 36, at 25; Phillips, *supra* note 36, at 10.

87. Even if a sealing order is not maintained up to the time of indictment, "prosecutors have often persuaded judges to continue the secrecy of search warrant affidavits long after the warrants have been executed." Phillips, *supra* note 36, at 10. For an example of substantial delay between a seizure in a health care fraud investigation and the unsealing of search warrant affidavits, *see In re Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp.*, 971 F. Supp. 251, 252 (W.D. Tex. 1997).

88. Finder, *supra* note 36, at 26.



based on accurate and legitimate information.<sup>89</sup> More basically, a white-collar search target will “not know whether the company, its employees, officers [or] directors are mere custodians of records which provide evidence against a third party (such as a customer or vendor) or whether they are the target on whom the prosecutor has substantial evidence linking them to a crime.”<sup>90</sup>

Search warrants obtained with sealed affidavits do not merely implicate litigation concerns, however. “[T]he execution of a search warrant is not just a minor intrusion on the operations of a business organization.”<sup>91</sup> Particularly with the increasingly frequent seizure of large segments of companies’ equipment and hardware, including computers, companies may be effectively shut down by a federal raid.<sup>92</sup> “The seizure of vital business records, documents and equipment obviously poses a real danger to an ongoing business, risking a complete overnight shut down, stemming cash flow and dealing a sometimes fatal blow to customer and supplier relations.”<sup>93</sup>

If an affidavit is filed under seal, “[w]hen the subject of this traumatic event seeks to understand what has generated this discord and why he or she is under investigation, the inquiry is often terminated by the discovery of a sealing order.”<sup>94</sup> One commentator with extensive experience in both white-collar criminal prosecution and defense described the situation for this target by stating:

The [target] clearly has an individual interest in and a need for the property. This interest derives from the fact that the [target] entity has a possessory interest in the property and uses the property (records,

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89. Phillips, *supra* note 36, at 10. Generally, under state or federal law, [a] defendant may make two types of challenges to the sufficiency of a warrant. First, he may make a facial challenge, and assert that the statements that appear in the warrant and affidavit when taken together do not amount to a showing of probable cause. Second, the defendant may make a subfacial challenge, and allege that the affiant intentionally or recklessly lied in the warrant or affidavit.

People v. Hobbs, 873 P.2d 1246, 1268 n.6 (Cal. 1994) (en banc) (Mosk, J., dissenting) (citing Illinois v. Gates, 462 U.S. 213 (1983), and Franks v. Delaware, 438 U.S. 154, 171 (1978)).

90. Johnson, *supra* note 7, at 13.

91. Phillips, *supra* note 36, at 11.

92. See Kowal, *supra* note 7, at 117; Naugle, *supra* note 7, at 18; Vacchio, *supra* note 7, at 27; Wallance, *supra* note 7, at 611.

93. Bradshaw & Hansen, *supra* note 7, at 23.

[Uncharged white-collar] clients may not be indicted for many months, if at all. There is nothing for the aggrieved, uncharged client to suppress since the client does not have a criminal case pending in federal court. In the meantime, the government has possession of the client’s property which may be crucial to the operation of the client’s business. Even if the client can operate for a time without the seized property, there may be sensitive and privileged records sitting in the local offices of the F.B.I. and U.S. Attorney. Left unaddressed, this situation may become inimical to the interests of the client (including its officers, directors and employees.

Finder, *supra* note 36, at 25.

94. Morvillo, *supra* note 36, at 3.

correspondence, telephone books and logs, business files, computers, accounts receivable and payable, etc.) to operate a business on a daily basis. Without these tools, the [target] cannot do business. . . . If the [target] is denied access to its property (or copies thereof) and cannot effectively operate, then the [target] may suffer irreparable harm. Orders will not be filled. Bills will not be paid. Business leads will not be acted upon in a reasonable period of time. Present and future business may be permanently lost. As a result, layoffs may occur if the situation is not immediately rectified.<sup>95</sup>

Meanwhile, “[a]ll [corporate counsel and the target] know for sure is that no legal proceeding is pending and the company may face an economic death penalty while the government contemplates criminal or civil action.”<sup>96</sup> If the affidavit remains under seal until an indictment is filed, the company could have no choice but to attempt to conduct business, lacking substantial amounts of important information, equipment, and assets.<sup>97</sup> “The company’s inability to survive that challenge might reduce its ability, and that of its employees, to effectively contest any indictment that is returned,” providing a tactical advantage that prosecutors can exploit by seeking sealing orders in bad faith.<sup>98</sup>

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95. Finder, *supra* note 36, at 25-26.

96. *Id.* at 26.

97. See Kowal, *supra* note 7, at 126; see also *supra* note 1 (discussing *Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432, 443 (W.D. Tex. 1993)).

98. Kowal, *supra* note 7, at 126. It might be objected that targets of search warrants with sealing orders, even small companies, have brought ruin upon themselves because the search and seizure arises from an investigation of their criminal activity. Of course, this is a persuasive argument only if the government is correct in suspecting that the target committed a crime. This will, however, often be borne out by the fruits of the raid itself. With a Rule allowing only *ex post* challenges, it will primarily be the guilty who seek to challenge sealing orders, because only these targets will face an ongoing government investigation or impending prosecution. Moreover, the probable cause determination, which is necessary to obtain a federal search warrant and which is based on the affidavit under seal, is precisely a determination that a crime has more probably than not been committed. See *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

There are two responses to this objection in defense of the proposed amendment to Rule 41. First, the probable cause determination may be largely a judicial rubber stamp of the investigating authority’s assertions. See Abraham S. Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1179-83 (1987). Courts have found probable cause lacking in cases in which a magistrate judge issued a search warrant based on a sealed affidavit, demonstrating that the warrant application process does not invariably authorize searches and seizures only in instances of genuine probable cause. See, e.g., *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987).

Second, this objection strays far from the government’s required burden of proof to overcome the presumption of innocence. A probable cause determination, whether the standard and its application are exacting or not, is simply *not* a determination by proof *beyond a reasonable doubt* that a crime has been committed by the target of the search and seizure. To argue that companies ruined by the effects of a federal raid executed under a sealed probable cause affidavit have received only what they deserve is to argue that a mere probable cause determination can seal the fate—by force of law—of a company, without any further

With federal law enforcement officials' continued emphasis on investigating and prosecuting health care fraud, increasing numbers of small health care providers will be subjected to federal raids authorized by search warrants with sealed affidavits.<sup>99</sup> In particular, small home health care agencies are likely to face government raids in the coming years, and searches of these small companies could be financially devastating, particularly where the affidavit is under seal for a prolonged period after the search.<sup>100</sup> A seizure of the major operating equipment and records of a small company often amounts to an "economic death penalty," even before the initiation of any formal legal action.<sup>101</sup>

#### IV. CHANGES IN THE PRACTICE OF SEALING SEARCH WARRANT AFFIDAVITS

##### A. *The Addition of Standards and Procedures for Sealing Affidavits to the Federal Rules of Criminal Procedure*

Rule 41 already partially codifies pre-indictment, *ex post* access to search warrant materials by requiring the magistrate judge to file the probable cause affidavit with the district court clerk, making the affidavit publicly available.<sup>102</sup>

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proof by the government.

Particularly serious and troubling concerns regarding a target's dignitary interests and the government's use of coercive search and seizure powers are therefore implicated by the exercise of this federal power when the basis for the probable cause determination (which itself justifies, without more, the action that destroys a company) remains—by force of law—hidden from the targeted company's view. As argued more fully below, serious dignitary and fairness policy considerations warrant a rule codifying the target's right to seek judicial reconsideration of the order imposing this secrecy.

99. See Naugle, *supra* note 7, at 18 (noting that, in searches in health care fraud investigations, "[s]earch warrant affidavits usually will be sealed from the outset"); see also *supra* note 10 and accompanying text. Several smaller health care companies recently have been subjected to similar searches and seizures. The search warrant clearly has become one of the federal government's preferred weapons in its battle against fraud and abuse in programs such as Medicare and Medicaid. Its use will surely become more frequent as the federal government continues to expand the anti-fraud project, known as Operation Restore Trust, into new states and new sectors of the health care industry. Robinson & Patterson, *supra* note 7, at 12.

100. See Todd D. Anderson & John W. Sadoff, Jr., *Home Health, Long-Term Care, and Other Compliance Activities*, HEALTHCARE FIN. MGMT., Apr. 1, 1999, at 48 ("Home health and long-term care organizations are the latest entities under study by the Office of Inspector General, and the result of these studies likely will be more antifraud and abuse measures being taken against these entities.").

101. Finder, *supra* note 36, at 26. For small companies, the seizure of major physical assets can be as ruinous as the seizure of the financial assets of large corporations through asset freeze orders and forfeitures. Cf. Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 959 (1993) ("Moreover, a corporation faced with the possibility of forfeiture must settle with the government prior to indictment, or suffer bankruptcy, whereupon the merits of the government's case will be settled by competing bestsellers.").

102. FED. R. CRIM. P. 41(g) ("The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized."); FED. R.

Several white-collar search warrant targets in reported cases have gone one step further by claiming a Fourth Amendment right of access to sealed affidavits, typically grounding their arguments in specific needs (e.g., to file Rule 41(e) motions for return of property or *Bivens* actions<sup>103</sup>) for pre-indictment access to the affidavit.<sup>104</sup>

This Article does not claim that the execution of search warrants issued through sealed affidavits should be eliminated as a violation of the Fourth Amendment. Instead, this Article advocates the adoption of a new subsection of Rule 41 to provide codified standards and procedures governing the practice of sealing affidavits and other warrant materials, as well as to afford targets presumptive, *ex post* access to search warrant materials.

These proposed standards and procedures are based upon a consideration of the important dignitary and fairness interests implicated by every warrant issued through a sealed affidavit. Targets have a legitimate interest in being able to access search warrant materials where the government does not come forward with compelling, paradigmatic reasons for preventing access. Further, federal prosecutors' use of sealing orders needs to be standardized to prevent further use of this once unusual procedure of sealing search warrant materials from becoming all too common and routine.<sup>105</sup> While the government's arguments in reported cases obscure this point, sealing, not a motion to unseal, is the deviation from the normal balance between access to information by the government and the procedural rights of a search warrant target. The following discussion addresses two serious policy considerations which support the adoption of the proposed procedures.

First, serious dignitary interests of a white-collar target are transgressed by any search and seizure of records or documents. The Supreme Court has long recognized that the Fourth Amendment protects a person's privacy and dignitary interests.<sup>106</sup> Moreover, a concern for human dignity runs throughout

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CRIM. P. 41(c) advisory committee's note to 1972 Enactment ("A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.").

103. See FED. R. CRIM. P. 41(e); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

104. See, e.g., *In re Up North Plastics, Inc.*, 940 F. Supp. 229, 233 (D. Minn. 1996); *In re Search of EyeCare Physicians of America*, 910 F. Supp. 414, 420 (N.D. Ill.), *aff'd*, 100 F.3d 514 (7th Cir. 1996); *In re Search of Wag-Aero, Inc.*, 796 F. Supp. 394, 395 (E.D. Wis. 1992).

105. See Morvillo, *supra* note 36, at 3. The author noted:

Unquestionably, there is sometimes a need for sealing and secrecy in criminal cases. There is a concern, however, that this process has become too automatic. It is hoped that district courts will analyze sealing applications more carefully to eliminate their purely tactical usages and grant them in situations where 'higher values' are truly being served.

*Id.*; see also *supra* Part I.

106. E.g., *United States v. Dionisio*, 410 U.S. 1, 14-15 (1973).

basic criminal law and procedure.<sup>107</sup> Yet, post-search access to a probable cause affidavit cannot possibly restore a person's privacy interest upon which the search intruded. "For those searches that do not turn up evidence of a crime, postsearch review and remedy, whether by a judge or a jury, obviously come too late to prevent the intrusion and restore lost privacy and dignity."<sup>108</sup>

However, there is a further dignitary interest that a search violates when conducted for reasons unknown to the target, even after the conduct of the search. This dignitary interest is often embodied in due process notice requirements, as described by Justice Brennan in dissent in *Whisenhut v. Spradlin*:

The requirement that the government afford reasonable notice of the kinds of conduct that will result in deprivations of liberty and property reflects a sense of basic fairness as well as concern for the intrinsic dignity of human beings. Furthermore, the rule is instrumental to the constitutional concept of "ordered liberty." By demanding that the government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values; reduces the danger of caprice and discrimination in the administration of the laws; and permits meaningful judicial review of state actions.<sup>109</sup>

This discussion is not meant as an argument that the Due Process Clause mandates the rule of criminal procedure proposed below. The dignitary interest that is violated by a search for which no justification or reason is provided, however, implicates the same fairness concerns that animate the due process notice requirement which runs throughout criminal law and criminal procedure. Invariably, a sort of "why me?" feeling is induced by coercive and unjustified, if not unjustifiable, government action within the often uncertain realm of white-collar criminal investigations. This action infringes a powerful dignitary value which federal criminal procedure should be concerned with protecting, absent a compelling government interest for concealing the reason for the search from the target. Therefore, prosecutors' use of search warrants which inherently invade privacy and dignitary interests should be circumscribed by a rebuttable presumption that a target must be provided with notice of the basic "what," "where," and "why" of a document-intensive,

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107. E.g., *McNabb v. United States*, 318 U.S. 332, 343 (1942); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L. & SOC. INQ. 533, 563 (1999) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)).

108. Klein, *supra* note 107, at 546.

109. 464 U.S. 965, 969 (1983) (Brennan, J., dissenting) (citations and footnote omitted).

highly-intrusive white-collar search and seizure once the government has executed a warrant.<sup>110</sup>

Second, the current regime of *ad hoc*, uncodified sealing procedures in federal courts undermines concerns for fairness among the targets of federal search warrants. A sealing order prohibiting access to search warrant materials for anything less than a compelling government interest unfairly deprives a search target of information that the courts make available to other targets, for reasons that do not relate to any concerns particular to the target or to the legitimate interests of the investigation. Thus, insofar as the absence of codified practices and standards governing sealing orders contributes to the proliferation of sealing orders sought in bad faith, important fairness considerations warrant the adoption of uniform procedures and standards governing sealing orders.

Moreover, the practices and standards applied to motions to seal and unseal search warrant materials in federal courts vary even among jurisdictions with local rules or binding precedents governing these matters. The differences in practices and standards across circuits, to the extent that any given federal circuit has standardized procedures governing the sealing of search warrant materials, touch upon even basic issues, such as the standard which the government must satisfy for a court to grant a sealing order.<sup>111</sup> Although all the reported decisions indicate that a court should conduct an *in camera* review of a sealed affidavit when the sealing order is challenged by a target, courts between jurisdictions differ on the basic procedure and the grounding of the right of access, if any, to search warrant materials.<sup>112</sup> The Fourth and Seventh Circuits restrict the target to a rather limited common law right of access.<sup>113</sup> Meanwhile, the Ninth Circuit holds that there is no common law right to preindictment access if an investigation is ongoing,<sup>114</sup> and the Eighth Circuit recognizes a more efficacious First Amendment right of access.<sup>115</sup> Furthermore, in the absence of a codified rule, targets of federal search warrants with sealed affidavits in the same state in a circuit which has no binding precedent on point may be forced to exercise radically different rights

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110. For a related discussion of due process concerns implicated by the sealing of search warrant materials, see *supra* note 98.

111. See *supra* text accompanying notes 52-67.

112. *Id.*

113. See *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989); *In re EyeCare Physicians of America*, 100 F.3d 514, 516 (7th Cir. 1996).

114. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989).

115. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988).

of access.<sup>116</sup> This disparity implicates serious fairness considerations between targets in different district courts within the same state.<sup>117</sup>

These dignitary and fairness interests demonstrate that the government should be required to justify sealing orders with a *compelling* interest in nondisclosure, first through a cursory showing to obtain an initial sealing order and later, upon more extensive proof, when a target challenges that order in an adversarial hearing after the search. The standards and procedures required for granting and challenging a sealing order should be incorporated into Rule 41. This amendment would improve upon the current situation in which magistrate judges issue sealing orders without any explicit statutory authorization and through different procedures in each jurisdiction, at times for reasons which would not satisfy a compelling interest standard.

If procedures were codified in Rule 41, it would also obviate the need for search targets, who are uniquely protected by the Fourth Amendment, to rely on the same, very limited *ex post* common law and First Amendment rights of access to sealed search warrant materials available to the press and the public.<sup>118</sup> The current rights of access generally prove of little avail to a white-

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116. Compare *In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296 (S.D. Ohio 1995) (finding that targets have a Fourth Amendment right to preindictment access), with *In re Search Warrant for 2934 Anderson Morris Road, Niles, Ohio*, 48 F. Supp. 2d 1082 (N.D. Ohio 1999) (reserving judgment on the existence of a Fourth Amendment right of access but holding, *arguendo*, that the target failed to meet the showing required under such a right, even if it exists).

117. Certainly a lack of uniformity in the interpretation of procedural rules and doctrines between federal districts in different states and circuits is not unusual, given the organization of the federal judicial system. In most instances, when a circuit split arises of sufficient importance or concern, the Supreme Court will grant certiorari and issue a decision to impose national uniformity. There is a more pressing need, however, for uniformity in the procedures and requirements governing federal prosecutions and investigations. See, e.g., *United States v. Rowell*, 903 F.2d 899, 902 (2d Cir. 1990) ("Policy considerations, particularly a concern for the 'uniformity of criminal evidentiary jurisprudence in the federal courts,' . . . further support the application of federal law in federal criminal prosecutions which rely on state investigations." (citations omitted)); *United States v. Ward*, 895 F. Supp. 1000, 1007-08 (N.D. Ill. 1995) (discussing the need for uniformity in the application of the anti-contact rule to federal prosecutors). Indeed, the Department of Justice implicitly recognizes the need for such uniformity through its promulgation of the United States Attorney's Manual and various regulations governing the conduct of federal prosecutors. See, e.g., 28 C.F.R. § 59.4 (Guideline on Methods of Obtaining Documentary Materials Held by Third Parties); UNITED STATES ATTORNEY'S MANUAL, Ch. 9-19.200 (Documentary Materials Held by Third Parties).

118. These access rights originate from the common law right of public access to judicial records and a First Amendment right of public access to criminal judicial proceedings. Three of the four federal appellate courts that have addressed the issue of access to sealed search warrant affidavits have found that targets, along with the general public, have a common law right of access to sealed search warrant materials. See *EyeCare*, 100 F.3d at 516; *Baltimore Sun*, 886 F.2d at 62; *Search Warrant for Secretarial Area*, 855 F.2d at 573. But see *Times Mirror*, 873 F.2d at 1219 (rejecting claimed common law right of access). A more controversial and less recognized right of access to sealed search warrant affidavits flows from the Supreme Court's line of cases recognizing a qualified First Amendment right of public access to criminal judicial proceedings, including access to federal and state criminal trials, voir dire examinations, and preliminary hearings. See generally *Keller*, *supra* note 4, at 743-50 (describing the Supreme Court's line of First Amendment access cases regarding criminal proceedings). The Eighth Circuit has recognized this right of access to sealed affidavits. *In re Search Warrant for Secretarial Area*, 855 F.2d at 573. The

collar search target seeking access to a sealed affidavit.<sup>119</sup> For example, only the Eighth Circuit has extended the more efficacious First Amendment right of access to sealed search warrant materials,<sup>120</sup> and only lower federal courts within that Circuit have followed its reasoning to recognize such a right.<sup>121</sup> Additionally, as several courts have noted, a First Amendment or common law right of access seems inappropriate for a search target seeking access to a sealed affidavit that supported the search and possibly seizure of his property.<sup>122</sup> Finally, white-collar search warrant targets seeking to invoke First Amendment or common law access rights to sealed affidavits face what often amounts to a Hobson's choice: seek access that will lead to bad publicity and other collateral harms if the press gets the affidavit, or acquiesce to ignorance of why the search occurred and remain unable to challenge a potentially illegal search and seizure.<sup>123</sup>

The dignitary and fairness interests of targets' access to search warrant materials differ in kind and outweigh the medias' or public's largely informational interests in access to search warrant materials in certain high-profile cases.<sup>124</sup> This is not to say that the public and the press should *not* have

Fourth and Ninth Circuits, however, have rejected the existence of this right. *Baltimore Sun*, 886 F.2d at 64; *Times Mirror*, 873 F.2d at 1216.

119. See *Finder*, *supra* note 36, at 27-28; *Morvillo*, *supra* note 36, at 3.

120. *Search Warrant for Secretarial Area*, 855 F.2d at 573.

121. *E.g.*, *In re Search Warrants Issued on June 11, 1988, for the Premises of Three Buildings at Unisys, Inc.*, 710 F. Supp. 701, 704 (D. Minn. 1989).

122. *In re Up North Plastics, Inc.*, 940 F. Supp. 229, 232 (D. Minn. 1996) ("None of these [First Amendment or common law access rights] cases answer the precise question at issue here, which is, not whether the public or press has a right of access, but whether the person whose property is seized has a right of access under the Fourth Amendment to the affidavit in support of the search warrant.")

[T]he cases dealing with the alleged right of the media or the public to access sealed warrant documents do not control the outcome of this case, [ which] involves the right of the person whose home has been searched to see the documents which were used to obtain the search warrant and directly involves his rights under the Fourth Amendment.

*In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 299 (S.D. Ohio 1995).

123. See *Kowal*, *supra* note 7, at 123 n.32; *Bradshaw & Hansen*, *supra* note 7, at 26; *McGough*, *supra* note 6, at 8.

124. *E.g.*, Reply Brief of Appellant at 8, *In re Search of EyeCare Physicians of Am.*, 100 F.3d 514 (7th Cir. 1996) (No. 96-1295). Counsel noted:

[T]he government arrogantly suggests that EyeCare "is simply an interested party in relation to the warrant proceedings—with no more right to see the search warrant application and affidavit than any other member of the press or public." (Gov't Br. at 24). This argument is disingenuous, at best. Unlike the press or public, EyeCare was the subject of a wide-ranging search and seizure with the attendant negative national publicity. Unlike the press or public, EyeCare is a potential defendant in criminal proceedings, and has more than a curious "interest" in why it was the subject of the government's massive search.

*Id.*

Several appellate court decisions have recognized various interests which the public and the media may have in disclosure of a search warrant affidavit in a particular case. *E.g.*, *Times Mirror Co. v. United*



access rights, but that targets of search warrants should have stronger rights of access to make materials available only for targets' unique interests.<sup>125</sup>

### *B. White-Collar Search Targets and New Standards and Procedures for Sealing Affidavits*

In addition to the privacy and fairness interests implicated by sealing orders on search warrant affidavits, the particular difficulties faced by white-collar targets of search warrants accompanied by sealing orders suggest that new standards and procedures should primarily facilitate greater access to sealed materials by white-collar search targets than by street crime search targets. White-collar search targets, unlike most street crime search targets, are effectively denied all access to the justification for an intrusive search and seizure if an affidavit is under seal.

Because courts allow broad descriptions of the documents to be searched in white-collar investigations, a target examining either a search itself or the warrant will often have little clue as to the government's justification for invading its privacy interests and disrupting its business.<sup>126</sup> The government may often simply seize vast amounts of business records with the intention of examining them for evidence of wrongdoing in another location at a later date.<sup>127</sup>

At the same time, as long as search targets of organized crime are considered street criminals, targets of search warrants in street crime investigations can be expected to pose a greater danger of physical threats to government informants and witnesses—one of the paradigmatic justifications

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States, 873 F.2d 1210, 1215 (9th Cir. 1989) (recognizing, but refusing to rest the decision on, the following "clearly legitimate" public interests in disclosure of warrant materials and proceedings: ensuring "self-government because observation of all aspects of the judicial process promotes open discussion of the process and permits the public to serve as a check on possible governmental abuses"; "enhanc[ing] the 'quality and safeguard[ing] the integrity of the fact-finding process,' as is true with public scrutiny of the criminal trial" (citation omitted); and providing "the same 'community therapeutic value' as open criminal trials, by serving as an outlet for the sense of outrage, insecurity and need for retribution that a community feels when a crime occurs"); *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 568, 576-77 (8th Cir. 1988) (Heaney, J., concurring and dissenting) (noting a strong public interest in disclosure of search warrant affidavits detailing "the defense contract and procurement scandal in this country," which is "a public concern of great immediacy and magnitude"). For several commentators' discussions of interests the public and media have in warrant affidavits, see Blumberg, *supra* note 4, at 470-72; Kaston, *supra* note 4, at 669-74; Thieme, *supra* note 4, at 92-95; Brantman & Martinsen, *supra* note 4, at 787-90; and Keller, *supra* note 4, at 741-42, 750-63.

125. See, e.g., *supra* text accompanying notes 68-70.

126. 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 4.6(d) (3d ed. 1996 & Supp. 1999); see also *supra* text accompanying note 90.

127. Naugle, *supra* note 7, at 18; cf. Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 918 (1985) ("Because papers cannot so easily be distinguished from each other, a typical search for a document is necessarily a rummaging search of the most intrusive kind.").

for sealing affidavits—than white-collar search targets.<sup>128</sup> Accordingly, white-collar targets present less apt justifications for sealing orders grounded in concerns for witnesses' and agents' safety, while simultaneously facing greater hardships from sealing orders.

The standards suggested in this Article, however, should promote greater access for white-collar targets without special procedural preferences. Because street crime search targets more often pose threats to witnesses' and officers' safety than white-collar targets, courts will more likely grant requests to seal the affidavits of street crime search warrants and will likely be able to find a compelling interest to deny these targets' challenges to sealing orders.

### C. Counter-Arguments Against Access to Search Warrant Materials by White-Collar Targets

It is important to note, however, that serious concerns often justify sealing search warrant materials to prevent disclosure to some white-collar search targets as well, precisely because of the nature of white-collar investigations. Notably, many of the reasons federal prosecutors seek sealing orders on white-collar search warrant materials coincide with the explanations for the growing preference for searches over document subpoenas in white-collar investigations. Prosecutors often worry that white-collar targets will withhold information or destroy evidence if given notice and opportunity.

Information control, or withholding inculpatory material from the government by a variety of means, often plays a central role in white-collar criminal defense strategies, "particularly when attorneys are brought into the case early."<sup>129</sup> With or without defense counsel involvement, potential white-collar defendants may also manipulate, conceal, or destroy documentary evidence of white-collar criminal activity.<sup>130</sup>

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128. See *People v. Hobbs*, 873 P.2d 1246, 1266 (Cal. 1994) (Mosk, J., dissenting) ("Further, this case did not involve organized crime or large quantities of valuable drugs, and thus did not involve a great threat of physical harm to the informer."); cf. Hazard, *supra* note 1, at 1524 ("[White-collar] crimes are committed not by means of physical force or threat of violence, but by dishonest statements and documents. The accused is not an underclass hooligan or thief, but a nice family man.").

129. MANN, *supra* note 1, at 8; see also William J. Gènego, *The New Adversary*, 54 BROOK. L. REV. 781, 797 n.68 (1988) ("Early entry may not only provide the defense with access to potential evidence that it would not be able to obtain at a later time . . . but it may also prevent the prosecution from procuring evidence they otherwise would have been able to obtain."); Henning, *supra* note 4, at 409-10.

130. MANN, *supra* note 1, at 117-22; see also Hazard, *supra* note 1, at 1532-34.

The nature of white-collar investigations facilitates this practice of information control. Professor Geoffrey Hazard has described the nature of white-collar crimes quite succinctly:

The existence of the crime can be established only by a prosecutorial investigation that puts together bits and pieces of evidence that are hidden, dispersed or seemingly innocuous. Documents typically have to be ferreted out from diverse places, many of them private files whose contents or existence the investigators can only surmise.<sup>131</sup>

Yet, to obtain and execute a white-collar search, a prosecutor must draft a warrant "describ[ing] the items to be seized with particularity, requiring detailed knowledge of the documents related to the transactions, thereby putting the investigation at risk if the warrant misses relevant items that may have been removed or about which the prosecutor is unaware."<sup>132</sup> Moreover, even when the government successfully seizes potential documentary evidence, white-collar investigations require close review of hundreds or thousands of documents, which often "concern[] both the potential violation and numerous other transactions that, while related, are not immediately suspicious"<sup>133</sup> and occurred months or years earlier.<sup>134</sup>

Compounding the government's difficulties, white-collar targets are often "sophisticated business people represented by highly skilled private attorneys."<sup>135</sup> This generally high level of sophistication also adds to prosecutors' concerns about document destruction and bad faith responses to subpoenas. Furthermore, prosecutors worry about obtaining the detailed and voluminous evidence required to successfully prosecute white-collar crime because these crimes paradigmatically involve "frauds whose very design seeks to leave no traces."<sup>136</sup> Generally, then, prosecutors find white-collar crimes difficult to investigate because "such crimes are often hidden within an organization and it is necessary to pierce the bureaucratic structure of the organization to decipher who did what and who knew what."<sup>137</sup>

Up to this point, these concerns have largely worked against the claims of white-collar targets seeking greater procedural protections.<sup>138</sup> Discussing grand jury subpoenas requiring unsupervised compliance by targets and their

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131. Hazard, *supra* note 1, at 1526.

132. Henning, *supra* note 4, at 414 (footnote omitted).

133. *Id.* at 413.

134. Pamela Bucy, *White Collar Crime and the Role of Defense Counsel*, 50 ALA. LAW. 226, 227 (1989).

135. Henning, *supra* note 4, at 476.

136. Hazard, *supra* note 1, at 1526; *see also* Pamela Bucy, *White Collar Crime*, *supra* note 134, at 226 ("White collar crime is deceit, concealment or deception committed for economic gain by professionals who are in a position of trust toward their victims.").

137. Bucy, *White Collar Crime*, *supra* note 134, at 227.

138. *See* Henning, *supra* note 4, at 476.

attorneys, the Supreme Court recognized the greater complexity and difficulty of prosecuting white-collar crimes and therefore "refused to impose bright-line restrictions on the prosecution's access to documents and ability to gather information from participants in the process of events under investigation."<sup>139</sup> Through the so-called "white collar rationale," courts cite the intrinsic difficulties of prosecuting white-collar crime to deny "further proscriptions on the government's ability to discover information" and to refuse to "give [targets] additional tools to conceal their criminal activity."<sup>140</sup> One commentator has offered a related prediction for potential procedural protections from government overreaching in white-collar investigations:

[T]he law surrounding white collar investigations shows a continuing trend in favor of the government, both through the use of select bright-line rules giving prosecutors broad power, and a case-by-case review that may punish prosecutorial misconduct but avoids imposing categorical limitations on the government's discretion to pursue investigations.<sup>141</sup>

In short, federal prosecutors and courts have serious concerns about white-collar crime which often serve as an initial rejoinder to any suggestion for statutory reform favoring access to investigative materials by white-collar targets.

Several observations, however, mitigate the effect of these counter-arguments against the adoption of new procedures and standards to govern sealing orders and to provide presumptive access to warrant materials to white-collar search targets. First, procedures requiring a particularized showing of a compelling government interest to maintain a sealing would not create a bright-line rule prohibiting the government from preserving the secrecy of its investigation or its witnesses' identities in cases in which disclosure poses a legitimate threat to these interests.<sup>142</sup> Rather, a codified requirement that the government meet a compelling interest standard to seal a probable cause affidavit simply mandates the case-by-case analysis which some courts already use to decide motions to seal.<sup>143</sup>

Second, a codified requirement of an *ex parte*, good faith showing of need before obtaining a sealing order would in no way undermine the effectiveness

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139. *Id.* at 410 (citing, *inter alia*, *Braswell v. United States*, 487 U.S. 99 (1988)).

140. *Id.*

141. *Id.* at 412.

142. *See supra* text accompanying notes 52-67.

143. *See, e.g.*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65-66 (4th Cir. 1989).

of a surprise raid on a white-collar target and would not enable the target to destroy or relocate documents.<sup>144</sup> In fact, a requirement that the government make a showing of a compelling government interest requires a prosecutor to do no more than show that the sealing order is genuinely needed because legitimate concerns that motivate an initial request to seal will also satisfy the compelling interest standard.<sup>145</sup>

Third, a showing of a compelling interest could be made, at the magistrate judge's discretion, *ex parte* or through a separate affidavit, albeit within the context of an adversarial hearing, allowing the government to describe the need for continued secrecy without revealing details of its investigation to the target.<sup>146</sup> Statutory provisions allowing *ex post* challenges to sealing orders will therefore, in sensitive cases, provide no additional opportunities for dangerous or obstructive targets to disrupt an investigation into complex white-collar crimes.

Moreover, after a search, a white-collar target will often know only that the government is investigating some activity in which the owner of the search premises is directly or indirectly involved.<sup>147</sup> If a sealing order is affirmed at an *ex post* hearing through the government's *ex parte* showing of a compelling interest in nondisclosure, the target will still know nothing more than that the government is conducting some investigation of its activities. The target will have no greater opportunities for surreptitious information control, document destruction or obstruction of the investigation than the government provided by executing the search warrant.<sup>148</sup> As such, in appropriate cases in line with the "white-collar rationale," rules allowing *ex post* challenges to sealing orders will not in themselves place "further proscriptions on the government's ability to discover information" nor provide targets "additional tools to conceal their criminal activity."<sup>149</sup>

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144. See Oberlander, *supra* note 4, at 2550-51 ("The interest in protecting against the destruction of evidence is not a concern as long as access to the affidavit is permitted only after execution of the warrant.").

145. Thus, the government could seek a sealing order in cases in which "other criminal suspects not yet the subject of a search might be identified [in the affidavit], allowing them time to alter the evidence or even flee the jurisdiction" if the information in the affidavit was disclosed. Levy, *supra* note 4, at 685. Yet, because "[t]hese risks . . . will be present only in some cases, while many more cases will involve very few such risks," the government should seek sealing orders only in cases legitimately posing such a risk. *Id.*

146. See *supra* text accompanying notes 46-47.

147. See *supra* text accompanying notes 90 & 126-27.

148. Cf. Oberlander, *supra* note 4, at 2550-51. The author states:

When the search warrant is only one part of a longer-term investigation, there indeed may be a compelling government interest in maintaining the affidavits under seal until the investigation is concluded or becomes public knowledge. But this interest too can be overstated, since, in some cases, the target of the search will know what the police are searching for and to what it relates. She will then be able to contact other participants in the criminal scheme and warn them. In these cases, releasing the affidavit would have no detrimental effect.

*Id.*

149. Henning, *supra* note 4, at 410; see also Pereyra-Suarez & Klove, *supra* note 4, at 37 ("The first clue to the government's investigation of a practice may come when a search warrant has been executed. Often a corporate entity has no idea that the government is conducting a criminal investigation until the

Accordingly, although modern forms of criminal activity necessitate the government's power to conduct document-intensive searches, new rules could provide additional safeguards for targets of these searches without hampering the government's ability to investigate complex white-collar crimes. Clearly, the use of search warrants often addresses the difficulties which white-collar crime poses to federal investigators. Further, sealing orders may also be needed to prevent some white-collar targets from destroying evidence or disrupting the government's investigation. Sealing orders should, however, be reserved for cases in which the government can show a compelling interest in nondisclosure arising from the likelihood that a white-collar target will misuse access to the affidavit.

#### V. JUDICIAL TREATMENT OF AN *EX POST* RIGHT OF ACCESS TO SEALED AFFIDAVITS

Before suggesting specific revisions to Rule 41, Part V reviews several federal court decisions which address white-collar search targets' claims of *ex post* rights of access to sealed search warrant affidavits based on the Fourth Amendment. Two federal district courts have recognized a preindictment Fourth Amendment right of access to sealed affidavits.<sup>150</sup> Without advocating these courts' reliance on the Fourth Amendment, these lower court decisions provide a useful framework for procedures and standards to govern the sealing of affidavits and *ex post* challenges to sealing.

The central reasoning of these decisions lies in the following observation in *In re Search Warrants Issued August 29, 1994*:

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search warrant is executed.”).

150. See *In re Up North Plastics, Inc.*, 940 F. Supp. 229, 230 (D. Minn. 1996); *In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 299 (S.D. Ohio 1995). Another recent district court decision explicitly compared and, proceeding *arguendo*, applied the holdings and standards of *In re EyeCare Physicians of America*, 100 F.3d 514, 517 (7th Cir. 1996), *Up North Plastics*, 940 F. Supp. at 232-34, and *August 29, 1994*, 889 F. Supp. at 299. See *In re Search Warrant for 2934 Anderson Morris Road*, 48 F. Supp. 2d 1082 (N.D. Ohio 1999). The court, in fact, applied precisely the kind of analysis which would prevail under the rule this Article proposes. See *id.* The court did so, however, only assuming, contrary to the Seventh Circuit's holding in *EyeCare Physicians*, that the targets of search warrants “do indeed have a Fourth Amendment right to inspect the search warrant affidavit,” and then applying the multi-factor test put forth by the court in *Up North*. *Id.* at 1084. While reserving judgment on the existence of a Fourth Amendment right of access, the court in *2934 Anderson Morris Road* held that the target failed to meet the showing required under such a right, even if it exists. *Id.* More recently, a district court approved of the *Up North* and *August 29, 1994* holdings in a post-indictment context only, and looked to the procedures recommended by the courts in, *inter alia*, *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989), and *In re Eyecare Physicians of America*, for preindictment challenges to sealing orders. See *In re Search Warrant*, No. 00-138M-01, 2000 WL 1196327 (D. D.C. July 24, 2000).

[I]f citizens are guaranteed by the Fourth Amendment the right ‘to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,’ it is inherently a part of that right that they be allowed to know whether the Fourth Amendment’s mandate of probable cause, supported by oath or affirmation, has been satisfied.<sup>151</sup>

Thus, the *August 29, 1994* court held that a target’s presumptive right of access to search warrant materials, arising from the Fourth Amendment, “may be overridden [only] when it is shown that precluding access is ‘essential to preserve higher values and is narrowly tailored to serve that interest.’”<sup>152</sup> Similarly, in *In re Up North Plastics, Inc.*, the court required the government to show a “compelling need” for nondisclosure and that “no less restrictive alternative” existed, short of a sealing order.<sup>153</sup> The *Up North* court held that, if the magistrate judge grants the government’s motion to seal, “[t]he time period to continue the sealing must be both reasonable and definite.”<sup>154</sup>

The Seventh Circuit, however, explicitly rejected an *ex post* Fourth Amendment right of access to sealed search warrant materials in *In re EyeCare Physicians of America*.<sup>155</sup> The court’s reasoning in that decision provides strong counter-arguments to the position taken by other district courts that there is a Fourth Amendment right, and to a lesser degree, raises a few objections to the procedures recommended in this Article for a new subsection of Rule 41. In *EyeCare Physicians*, the target explicitly claimed a Fourth Amendment “right of access to sealed affidavits.”<sup>156</sup> The Seventh Circuit panel responded that “[the target’s] argument does not rest upon the terms of the Fourth Amendment, for the text of that Amendment does not address, even implicitly, the problem of lack of access to sealed search warrant affidavits.”<sup>157</sup> The court then rejected the target’s reliance on “the unpersuasive case of *In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296 (S.D. Ohio 1995), a district court opinion which is conclusory at best (with respect to the applicability of the Fourth Amendment) and conspicuous for its lack of analysis.”<sup>158</sup> The Seventh Circuit panel observed that the “[*August 29, 1994*] court essentially held with little explanation that the Fourth Amendment applies to sealed search warrant affidavits.”<sup>159</sup>

The *EyeCare Physicians* court also rejected the target’s reliance on *In re Search of Wag-Aero, Inc.*, in which the district court found that “due process

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151. *August 29, 1994*, 889 F. Supp. at 301.

152. *Id.* at 299 (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

153. *Up North*, 940 F. Supp. at 233 (following *Aug. 29, 1994*, 889 F. Supp. at 298-99 & 301-02).

154. *Id.*

155. 100 F.3d 514, 517 (7th Cir. 1996).

156. *Id.*

157. *Id.* (citing U.S. CONST. amend. IV).

158. *Id.*

159. *Id.* at 517 n.3.

was lacking" in a white-collar search conducted under a warrant with a sealed affidavit.<sup>160</sup> The *Wag-Aero* court held that a white-collar target had a due process right flowing from its need for access to the affidavit to effectively decide "whether it wishe[d] to challenge the issuance of the search warrant and whether it wishe[d] to seek to obtain the return of its property."<sup>161</sup> In response to the target's reliance on the *Wag-Aero* court's reasoning, the Seventh Circuit remarked, "we realize it would be most advantageous and a defense attorney's dream to have knowledge of the contents of the affidavits in challenging whether the warrant was actually supported by probable cause."<sup>162</sup> According to the Seventh Circuit, however, "[b]y the very nature of a secret criminal investigation of this type, the target of an investigation more often than not remains unaware of the specific grounds upon which a warrant was issued."<sup>163</sup> The Seventh Circuit feared that a due process requirement of preindictment access to sealed affidavits would potentially cripple criminal investigations.<sup>164</sup>

While the Seventh Circuit soundly repudiated the target's claim to a Fourth Amendment right of access to sealed affidavits, its arguments do not persuasively defeat a claim for a statutory presumption of access by targets to search warrant materials. The shortcomings of the Seventh Circuit's arguments demonstrate that dignitary and fairness interests and a need for standardization in access to search warrant materials support the adoption of the procedures recommended in Part VI.

First, the Supreme Court has held that warrants are intended, in part, to inform the target of the reasons for the government's invasion of his privacy.<sup>165</sup> The denial of access to the probable cause affidavit frustrates this purpose, such that the government should be required to show a compelling interest to deny a target access to the materials underlying a warrant. Contrary to the Seventh Circuit's disparaging remarks about the reasoning of the district court in *In re Search Warrant Issued August 29, 1994*,<sup>166</sup> this explanation elucidates the sense in which that court's central observation provides support for a statutory, presumptive right of access, unless the government shows a compelling need

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160. *Id.* at 516 (citing *In re Search of Wag-Aero, Inc.*, 796 F. Supp. 394 (E.D. Wis. 1992)).

161. *In re Search of Wag-Aero, Inc.*, 796 F. Supp. 394, 395 (E.D. Wis. 1992).

162. *In re EyeCare Physicians of America*, 100 F.3d 514, 516 (7th Cir. 1996).

163. *Id.* at 516-17.

164. *Id.* at 517 ("If preindictment disclosure of sealed warrant affidavits was required to satisfy due process (assuming there had been a predicate deprivation of life, liberty or property), the hands of law enforcement would be needlessly tied and investigations of criminal activity would be made unduly difficult if not impossible.").

165. *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) ("[A] major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality.") (citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

166. See *supra* text accompanying notes 158-59.



for nondisclosure.<sup>167</sup> Although the *August 29, 1994* court located this right in the Fourth Amendment, the essential thrust of its reasoning can be carried over to a policy-based claim for a new rule governing access to warrant materials and sealing orders.

Second, the historical practice surrounding federal search warrants supports a statutory presumption favoring *ex post* access for targets to warrant materials. In the 1972 Amendments to Rule 41(c), the Advisory Committee for the Federal Rules of Criminal Procedure eliminated Rule 41's "requirement that the warrant itself state the grounds for its issuance and the names of any affiants . . . as unnecessary paper work."<sup>168</sup> The Advisory Committee, in its notes to the 1972 Enactments of Rule 41(c), indicated that "[a] person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued" under Rule 41(g).<sup>169</sup> Thus, prior to 1972, a federal search warrant issued under Rule 41(c) itself informed the target of the reason for the search. There is no reason to believe that the Advisory Committee meant to deny targets the ability to know why the government invaded their privacy, at least after the search, simply to do away with "unnecessary paper work." Rather, this history demonstrates a presumption in Rule 41 that targets will generally learn the basis for the government's invasive actions after the search.<sup>170</sup>

Accordingly, while Rule 41(g) does not itself create a substantive access right, the filing requirement in Rule 41(g) conclusively demonstrates that the default disposition for federal search warrant materials should be public availability.<sup>171</sup> In this sense, the Seventh Circuit correctly noted that "a proper reading of Rule 41(g) does not include a constitutional right of access to sealed warrant affidavits."<sup>172</sup> What follows from this observation is that Rule 41(g) does not confer a Fourth Amendment right of access, but what does *not* follow

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167. See *supra* text accompanying note 151.

168. FED. R. CRIM. P. 41(c) advisory committee's note to 1972 enactment.

169. *Id.*

170. See Phillips et al., *supra* note 36, at 9.

171. See e.g., *Times Mirror Co. v. United States*, 873 F.2d 1210, 1214 (9th Cir. 1989). The court in *Times Mirror* stated:

[M]ost search warrant materials routinely become public after the warrant is served. If the government does not request a sealing order and the magistrate files the returned warrant materials with the clerk of the district court, as required by Fed. R. Crim. P. 41 (g), the warrant materials become public records like any other document filed with the court.

*Id.*; see, e.g., Finder, *supra* note 36, at 27 ("The search warrant affidavit should bear the same cause number as the search warrant and should be available from the District Clerk's office, unless it was filed under seal."); Telephone Interview with Cynthia Davis, *supra* note 36 (noting that the presumption in the Clerk's Office is to file search warrant materials, making them available to the target); Telephone Interview with Linda Gonzales, Magistrate Clerk, Southern District of Texas (Houston District Court) (Apr. 8, 1999) ("Usually [search warrant materials are] sealed until they are returned, and, once they are unsealed[, they are] made available to the public unless there's an order to seal in the file also. And then it will not be unsealed or available until the judge unseals it.").

172. *In re EyeCare Physicians of America*, 100 F.3d 514, 517 (7th Cir. 1996).

is that the default procedure has not been, and should not be, *ex post* access to search warrant materials.<sup>173</sup>

Third, the Seventh Circuit's argument that, "[b]y the very nature of a *secret* criminal investigation of this type, the target of an investigation more often than not remains unaware of the specific grounds upon which a warrant was issued"<sup>174</sup> simply does not square with the long-standing view that sealing is "an extraordinary action" by a court.<sup>175</sup> Moreover, unless the court meant that sealing orders, once granted and thereby made part of a "secret" investigation, are rarely vacated until the government concludes its investigation, this observation simply does not comport with the standard practice of publicly filing search warrant materials.<sup>176</sup> Regardless of what the Seventh Circuit intended by this argument, the government should be required to make a compelling showing of need to maintain an investigation's complete secrecy once a search warrant has been executed.

Finally, the Seventh Circuit is partially correct that the Fourth Amendment does not address a right of access to affidavits.<sup>177</sup> The Fourth Amendment limits only how the government may exercise its search and seizure power *against* the interests of private persons or organizations.<sup>178</sup> Congress remains

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173. As a somewhat representative sampling of the general practice of district court clerk's offices in filing search warrant materials with or without sealing orders upon receipt of the search warrant materials from the magistrate judge, I contacted the clerk's offices of the federal districts from which the search warrants considered in *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988), *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), *In re EyeCare Physicians of America*, 100 F.3d 514, 516 (7th Cir. 1996), and *In re Grand Jury Proceedings*, 115 F.3d 1240, 1246 (5th Cir. 1997) (quoting with approval *EyeCare Physicians*, 100 F.3d at 517), respectively, originated: the Eastern District of Missouri, St. Louis Division; the Northern District of Maryland, Baltimore Division; the Northern District of Illinois, Eastern Division (Chicago); and the Southern District of Texas (Houston District Court). My conversations with representatives of these district court clerks' offices confirm that, absent a sealing order from the magistrate judge, executed and returned search warrant materials are made available to targets and the public. Telephone Interview with Cynthia Davis, *supra* note 36; Telephone Interview with Felicia Cannon, *supra* note 36; Telephone Interview with Nelida Finch, *supra* note 3; Telephone Interview with Linda Gonzales, *supra* note 171.

174. *EyeCare Physicians*, 100 F.3d at 516 (emphasis added).

175. WRIGHT, *supra* note 34, § 672 at 752.

176. In fact, the Seventh Circuit's observation is not corroborated by the practice in the Northern District of Illinois, in which the *In re EyeCare Physicians of America* search warrant was issued and executed. Telephone Interview with Nelida Finch, *supra* note 3 (noting that, in the absence of a sealing order, when a search warrant return has been turned over to the Clerk's Office in accordance with Rule 41(g), the materials are filed within the criminal case file or, in the absence of a pending complaint or indictment connected with the search, under a miscellaneous cause number; in the absence of a sealing order, these materials are publicly available).

177. *EyeCare Physicians*, 100 F.3d at 517.

178. U.S. CONST. amend. IV (stating that "no warrants shall issue, but upon probable cause, supported by oath of affirmation . . .").

free to provide a statutory framework of presumptive access to search warrant materials after the government has executed a warrant.

#### VI. THE ADDITION OF RULE 41(I) TO THE FEDERAL RULES OF CRIMINAL PROCEDURE TO PROVIDE STANDARDS AND PROCEDURES FOR MOTIONS TO SEAL AND UNSEAL SEARCH WARRANT MATERIALS

In devising new procedures to govern the sealing of search warrant affidavits and targets' challenges thereto, the overall procedures adopted by the District Court for the Southern District of Ohio in *In re Search Warrants Issued August 29, 1994*,<sup>179</sup> and the Fourth Circuit panel in *Baltimore Sun Co. v. Goetz*<sup>180</sup> provide a sensible model for the federal courts to follow. A new Rule 41(i) would read:

(i) Sealing Affidavits.

(1) Initial sealing orders. If the government, upon issuance of a warrant under Rule 41(c)(1), moves for an order to seal the affidavit or any other materials upon which the warrant is issued, the government must make a factual showing of good cause. Upon finding such good cause, the magistrate judge shall place the affidavit and any other materials the government requests under seal for a fixed time to be stated in the order granting the request to seal.

(2) Challenges to sealing orders. Upon a challenge to the sealing order or a motion to unseal, filed by the person searched or whose premises have been searched, the magistrate judge shall convene a hearing to be attended by the person searched or whose premises have been searched, at which the government shall be required to make a specific factual showing that a compelling governmental interest requires the materials be kept under seal, including but not limited to a real possibility of harm to the government's investigation or third parties, and that there is no less restrictive means, such as redaction, available to serve that interest. If the magistrate judge finds the government has made a sufficient showing, the magistrate judge shall continue the order placing the requested materials under seal. The reasons for granting this order must be articulated in written form along with findings specific enough for a reviewing court to determine whether the sealing order was properly entered. Upon request by the government, the order sealing the materials and the government's motion also may be filed under seal. The order must state a reasonable and definite time period during which the affidavit and other materials will be sealed.

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179. 889 F. Supp. 296, 299 (S.D. Ohio 1995).

180. 886 F.2d 60, 65 (4th Cir. 1989).

(3) Extensions of sealing orders. Upon the expiration of the specified time period, the government may request another hearing before the magistrate judge, to be attended by the person searched or whose premises were searched. At this hearing, the government must make a specific factual showing that a compelling governmental interest requires that the sealing order be continued and that there is no less restrictive means available to serve that interest. If the magistrate judge finds the government has made a sufficient showing, the magistrate judge shall follow the procedures specified above in subsection (i)(2) of this Rule.<sup>181</sup>

One might object that the suggested standard for initially sealing warrant materials is too weak. A stricter standard in the first instance might obviate the need for later adversarial hearings. There are two rationales for the standards suggested above. First, the “good cause” standard for the government’s initial motion to seal recognizes the need for expediency in issuing search warrants.<sup>182</sup> Requiring the government to provide a full showing of a compelling interest would risk delaying a search for which the magistrate judge has found probable cause. Second, this proposed rule recognizes that once the government’s interest in securing and conducting an effective search and seizure is fulfilled, a challenge to the sealing order should involve an adversarial process with a vigorous presentation of the target’s countervailing interests in disclosure.<sup>183</sup> Moreover, as the proposed language indicates, the showing necessary to meet the “compelling government interest” requirement would allow the government to maintain a sealing order for most justifications currently accepted by the courts (e.g., the target will likely disrupt the investigation, destroy evidence, or

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181. I am not the first to suggest revisions to the Federal Rules or new federal statutes governing sealing procedures.

As a prophylactic to future abuse of the sealing process, it is necessary for Congress to amend the Federal Rules of Criminal Procedure to specify that after the service of a search warrant, the warrant and all supporting documents should be made available to the public within twenty-four hours, unless the government demonstrates by clear and convincing evidence that there is a substantial risk that specific harm may result from unsealing the warrant.

Kopel & Blackman, *supra* note 4, at 38, 51 (“An order to seal may only be based on a demonstration, by clear and convincing evidence, that there is a substantial risk of injury to persons or property if an order to seal is not granted.”).

182. See *Franks v. Delaware*, 438 U.S. 154, 169 (1978) (“The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.”); *Baltimore Sun*, 886 F.2d at 65 (“Frequently the proceedings must be conducted with dispatch to prevent destruction or removal of the evidence.”) (citing *Franks*, 438 U.S. at 169)).

183. Cf. *Franks*, 438 U.S. at 169 (“The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous.”).

threaten witnesses),<sup>184</sup> provided the government can make a specific showing. But “the [mere] fact that there *is* an on-going criminal investigation,” without more, would not be enough to justify maintaining the sealing order.<sup>185</sup>

Finally, the requirement that the magistrate judge set a “reasonable and definite” time limit on the sealing order echoes a suggestion that others have made in a similar form.<sup>186</sup> This requirement comports with the Ninth Circuit’s observation, shortly after its 1979 decision first recognizing courts’ power to seal affidavits, that “the rights of the [search warrant target] . . . become more critical with the passage of time.”<sup>187</sup>

## VII. CONCLUSION

The discussion throughout this Article demonstrates an important truism that perhaps has been observed more often in the context of civil rather than criminal procedure:<sup>188</sup> Procedural rules inevitably and necessarily determine the substantive protections of important interests that a person will be afforded. In the white-collar context, federal prosecutors have legitimate concerns for obtaining needed information and evidence from white-collar investigative targets. However, strong dignitary and fairness interests support the adoption of uniform procedures and standards ensuring that a search warrant target will have its privacy invaded and property seized only if the government provides the target access to the reasons for the government’s invocation of its often underestimated power of search and seizure or shows a compelling reason for non-disclosure.

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184. See *supra* text accompanying notes 58-65.

185. *In re Search Warrants Issued* Aug. 29, 1994, 889 F. Supp. 296, 299 (S.D. Ohio 1999) (emphasis added); see also Kopel & Blackman, *supra* note 4, at 38 (“Mere generalized assertions by the government that unsealing the warrant would compromise an investigation should not be sufficient.”). This differs from the current practices of several federal courts. See *supra* text accompanying notes 66-67.

186. See *In re Up North Plastics, Inc.*, 940 F. Supp. 229, 233 (D. Minn. 1996); Kopel & Blackman, *supra* note 4, at 50-51 (“[O]rder to seal a warrant, affidavit, record of testimony, related papers, or voice recording shall not extend beyond the shorter of: thirty (30) days from the date of entry of such order; or the execution of the warrant. Such order may be renewed upon a showing of good cause.”); Kopel & Olson, *supra* note 4, at 339 (“There should be a limit on the period of time for which warrants, affidavits, and related items can be sealed prior to and after service, with limited periodic review if extensions are shown necessary.”).

187. *Offices of Lakeside Non-Ferrous Metals, Inc. v. United States*, 679 F.2d 778, 780 (9th Cir. 1982); see also *id.* at 779-80 (“When this [sealing] procedure is used . . . the Government has the obligation to conduct its investigation with diligence, for under any other interpretation the Government, having all of its evidence under seal, might be inclined to delay proceedings, rather than to expedite them.”).

188. But see Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1149 (1960).